Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

NO. 80-957

In the Supreme Court of the United States

OCTOBER TERM, 1980

ODOM CONSTRUCTION COMPANY, INC. AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

Petitioners

VERSUS

U.S. DEPT. OF LABOR AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAM, U.S. DEPT. OF LABOR AND GARFIELD MAZE, JR.

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Is an employee of a construction company, sent to remove mooring blocks from a barge fleeting area not customarily used by his employer and whose testimony indicated that he had only worked in proximity to navigable waters on one prior occasion, a "maritime" worker within the meaning and intent of 33 U.S.C. 902(3) and in light of *P.C. Pfeiffer Company, Inc., et al vs. Diverson Ford, et al,* 100 S.Ct. 328 (1979)?

PARTIES TO THE PROCEEDING IN COURT

Odom Construction Company, Inc.

American Mutual Liability Insurance Company

Benefits Review Board, U.S. Department of Labor

Garfield Maze, Jr.

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Opinion of Administrative Law Judge,
Dated April 13, 1976, No. 76-LHCA-213,
OWCP No. 7-34536

GROUNDS ON WHICH JURISDICTION IS INVOKED

The date of the judgment of the U.S. Fifth Circuit Court of Appeals sought to be reviewed is July 21, 1980.

The statutory provision conferring jurisdiction upon this Court to review this judgment by writ of certiorari is 28 U.S.C. 2101.

STATUTES INVOLVED

33 U.S.C. 902

33 U.S.C. 903

STATEMENT OF THE CASE

Plaintiff, Garfield Maze, on the date of the accident, July 9, 1973, was sent by his employer, Odom Construction Company, to perform certain tasks at the Domtar Salt Mine Facilities near Franklin, Louisiana. He had been instructed to cut and tie cables to four barge concrete blocks in order to facilitate the removal of the blocks from the edge of a navigable canal. Several years prior to the incident, Domtar had placed the blocks on dry land to provide a method of tying up salt barges either awaiting removal to the Domtar loading facility or, after the barges were loaded at the facility and returned to the blocks, awaiting tow boats for their removal. Odom Construction, plaintiff's employer, took no part whatsoever in the tying up, loading or fleeting of said barges.

Over the period of years following initial placement of these blocks on dry land, erosion of the banks of the canal caused the blocks to be in the edge of the water at the time of plaintiff's injury.

The entire operation and involvement of Odom Construction, the plaintiff's employer, consisted of furnishing equipment, the plaintiff and one other worker necessary to remove these blocks to dry land and this procedure took two days to perform.

At the time of plaintiff's injury, near the end of the first day's work, plaintiff was standing some 20 feet from the water's edge on a dirt road. He was using an oxy-acetylene torch to cut a cable to the proper length. The cable was to be attached

to one of the four concrete blocks in order to pull that block from the water's edge the following day. The torch exploded, causing burns to both arms and the face of plaintiff.

Upon trial of the matter, evidence was elicited which indicated that plaintiff had only *de minimis* contact with any activities of his employer that had even a remotely maritime connexity. The job being performed by plaintiff at the time of his injury was only remotely related to maritime activity.

The accident occurred in an area that was not customarily used by his employer in either loading, unloading, repairing or building any vessels.

ARGUMENT

The Fifth Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. This decision may also be in conflict with applicable decisions of this Court.

There is no doubt that plaintiff-appellee was employed by defendant-appellant, Odom Construction Company, but a serious question exists as to whether or not plaintiff-appellee is an *employee* within the intendment of 33 U.S.C. 902(3), which provides:

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations and any harborworker, including a ship repariman, ship builder, and ship-breaker. . . "

Necessarily, because of the statutory construction, to adequately define employee one must also define the term *maritime employment*. In a most important case interpreting the 1972 amendments to the Longshoreman's Act. *Northeast Marine Terminal Co., Inc. v. Caputo*, 97 S.Ct. 2348 (1977), this Court undertook this task. It should be recalled that, although their injuries occurred on land, both Respondent Caputo and Respondent Blundo were engaged in handling ship's cargo. Conceding that Caputo and Blundo were employed by petitioners, the Court first examined congressional intent to determine whether or not there was a congressional purpose for expanding the coverage of the LHWCA to include Caputo. The reason, of course, was found in the House Report, H.Rep. 639 (67th Cong. 2d Sess. 2), setting forth the initial reasons for the first congressional attempts to provide a compensation act for maritime workers. At n. 12, the Court quoted:

> "They are part of the local labor force and are permanently subject to the same conditions as are other local workmen. The work of longshoremen is not all on ship. Much of it is on the wharves. They may be at one moment unloading the dray or a railroad car or moving articles from one point on the dock to another, the rest actually engaged in the process of loading or unloading cargo. Their need for uniformity is one law to cover their whole employment, whether directly part of the process of loading or unloading a ship or not."

That plaintiff-appellee is not part of that labor force intended to be covered by Congress and was not permanently subject to the same conditions as other local workmen is best exemplified by plaintiff-appellee's own testimony. Additionally, unlike Caputo and Blundo, when asked to describe his work in general and not the work specifically being done at the time of the accident, plaintiff-appellee described it as cement finishing and building forms; that he did not operate any type of heavy equipment, nor did he do any welding or cutting. (Tr. at 31).

Plaintiff apparently testified that in addition to the job that he was on at the time of his injury, he had only previously been on two other jobs involving any proximity to the water, but only described one of those jobs as being on navigable waters. (Tr. at 127-128).

On the other hand, Mr. Odom, testifying and corroborating his testimony through the use of plaintiff-appellee's time sheets, stated that plaintiff apparently had never been on another job where he was anywhere close to navigable waters. (Tr. at 119).

Prior to the 1972 amendments to the LHWCA, it was not necessary that an employee be engaged in maritime employment, as long as he was injured while upon navigable waters. *Pennsylvania Railroad Co. v. O'Rourke*, 73 S.Ct. 302 (1953). *Caputo* held otherwise. The Court, in addressing itself to the expanded definition of "navigable waters" found in 903(a), stated at page 2357-2358:

> "But with the definition of 'navigable waters' expanded by the Amendments to include such a large geographical area, it became necessary to describe affirmatively the class of workers Congress desired to compensate. It therefore added the requirement that the injured worker be 'engaged in maritime employment' which it defined to include 'any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repariman, ship builder and shipbreaker, but. . . not . . . a master or member of a crew of any vessel or any person engaged by the master to load or repair any small vessel under eighteen tons net." 33 U.S.C. ¼902(3).
>
> The amendments thus changed what had been essentially only a 'situs' test of eligibility for compensation to one looking to both the 'situs' of the injury and the 'status' of the injured. We must now determine whether respondents satisfied these requirements."

The Court thus found that to determine Caputo's "status", it must determine whether Caputo was engaged in "maritime employment" and therefore an "employee" at the time of his injury. Relying upon a typical, but non-exclusive, example given by Congress, the Court quoted at length n. 27 on page 2358:

> "The intent of the Committee is to permit a uniform compensation system to apply to employees who would

otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. *The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.* Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e., a person at least some of whose employees are engaged, in whole or in part, in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even

> if injured on a pier adjoining navigable waters. (Emphasis added.)

An important, recent case decided by this Court is *P.C. Pfeiffer Co., Inc. v. Ford,* 100 S.Ct. 328 (1979) in which the "occupational test" doctrine was further examined.

A worker such as Caputo or Blundo, who works on land, but who also checks, marks or otherwise handles cargo is covered by the Act. This Court also noted that:

> "Landbased workers who do not handle containerized cargo also may be engaged in loading, unloading, repairing or building a vessel." *P.C. Pfieffer Co., Inc. v. Ford,* 100 S.Ct. 328 (1979).

Presumably, the listed categories of workers would also be covered. In the above-cited case, this Court held Respondent Ford to have been engaged in the type of duties that longshoremen perform in transferring goods between ship and land transportation and consequently, to be covered by the Act, although injured on land.

Mr. Maze, at the time of his injury, was engaged in cutting steel lines with a welding torch in order to move concrete blocks from the water's edge to dry land. It is submitted that this is not the type of work traditionally engaged in by longshoremen, nor was he involved in the repairing or building of a vessel.

It is not rational to think that the Congress, in its clearly expressed intent to cover certain employees for all of their activities in order to provide uniformity when they would

otherwise only be covered for part of their activities, intended that the LHWCA cover that employee for all of his activities when his contact with traditionally maritime employment was strictly of a *de minimis* nature. This is made clear by the Caputo decision at page 2362, where the Court states:

> "The Act focuses primarily on occupations -- longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker. Both the test and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the amendments, would be covered only for part of their activity. It seems clear, therefore, that when Congress said it wanted to cover "longshoremen", it had in mind persons whose employment is such that they spend at least some of their time in *indisputable longshoring operations* and who, without the amendments, would be cevered for only part of their activity." (Emphasis added.)

That these concrete blocks were to be used to anchor barges belonging to someone other than defendant-appellant, Odom Construction Company, is not controverted. That these concrete blocks resemble neither a pier or wharf is given. They are used only for the temporary securing of barges and not for loading or unloading. (Tr. at 110).

In the words of Caputo at 2362:

> "It seems clear, therefore, that when Congress said it wanted to cover 'long-

> shoremen', it had in mind persons whose employment is such that they spend some of their time in *indisputable longshoring operations* and who, without the amendments would be covered for only part of their activity." (Emphasis added.)

It is to be noted that plaintiff-appellee herein would have apparently been covered for none of his activities prior to the amendments in view of the paucity of testimony that he had worked over navigable waters, and in view of the fact that his injury occurred upon dry land. It is further submitted that it was not the congressional intent to cover claimants, as plaintiff-appellee herein, who had only *de minimis* contacts with maritime activity.

To allow a land-based construction worker such as the plaintiff to be classified as a maritime worker under the Act would upset the intended sharing of risks resulting from insurance coverage. Premiums are paid at differing rates based upon coverage afforded, and to require maritime coverage for one such as plaintiff, who was only fleetingly in proximity to a navigable waterway, would require a re-structuring of all coverages provided to construction companies such as your petitioner and, for the most part, needles expenditure of premium dollars and overhead expense.

The Court should grant the requested writ in order to clear up this question which has never been directly addressed by this Court in consideration of a non-cargo handler, non-shipbuilder or non-"ship-breaker", but merely a land-based construction worker.

STATE OF LOUISIANA
PARISH OF LAFAYETTE

BEFORE ME, the undersigned authority, personally came and appeared:

JOHN A. BIVINS

who, after being duly sworn stated:

That to his knowledge, information and belief the mailing of the Petition for a Writ of Certiorari to the Fifth Circuit Court of Appeal, in the matter of Odom Construction Company, Inc. and American Mutual Liability Insurance Company vs. Benefits Review Board and Garfield Maze, Jr., In the Supreme Court of the United States took place on the 20th day of October, 1980.

/S/ JOHN A. BIVINS
JOHN A. BIVINS

SWORN TO AND SUBSCRIBED, BEFORE ME, this 20th day of October, 1980.

KENNETH M. HENKE
NOTARY PUBLIC
LAFAYETTE PARISH,
LOUISIANA

PROOF OF SERVICE

I HEREBY CERTIFY that the required number of copies of the foregoing Petition for a Writ of Certiorari were properly addressed to all parties and deposited in the United States Mail, postage prepaid, as follows:

1. 40 copies of the Petition to the Office of the Solicitor General, Department of Justice, Washington, D.C. 20530.

2. Mr. John E. Conery
Attorney at Law
P.O. Box 1026
Franklin, Louisiana 70538
Attorney for Garfield Maze, Jr.

3. Benefits Review Board
U.S. Department of Labor
Director, Office of Workers' Compensation Program
1111 20th Street, N.W.
Suite 757
Washington, D.C. 20036

Lafayette, Louisiana, this day of November, 1980.

/S/ JOHN A. BIVINS
JOHN A. BIVINS

APPENDIX

A) 33 U.S.C. 902:

"Definitions.

When used in this chapter –

1) The term 'person' means individual, partnership, corporation, or association.

2) The term 'injury' means accidental injury or death arising out of and in the course of employment and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidable results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other persons engaged in longshoring operations, and any harborworker including a ship repariman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

5) The term 'carrier' means any person or fund authorized under section 932 of this title to insure under this chapter and includes self-insurers.

6) The term 'Secretary' means the Secretary of Labor.

7) The term 'deputy commissioner' means the deputy

commissioner having jurisdiction in respect of an injury or death.

8) The term 'State' includes a Territory and the District of Columbia.

9) The term 'United States' when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof.

10) 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

11) 'Death' as a basis for a right to compensation means only death resulting from an injury.

12) 'Compensation' means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein.

13) 'Wages' means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

14) 'Child' shall include a posthumous child, a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. 'Grandchild' means a child as above defined of a child as above defined. 'Brother' and 'sister' includes stepbrothers

and stepsisters, half brothers and half sisters, and brothers and sisters by adopted, but does not include married brothers nor married sisters unless wholly dependent on the employee. 'Child', 'grandchild', 'brother', and 'sister' include only a person who is under eighteen years of age, or who, though eighteen years of age or over, is (1) wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability, or (2) a student as defined in paragraph (19) of this section.

15) The term 'parent' includes step-parent and parents by adoption, parents-in-law and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

16) The terms 'widow or widower' includes only the decedent's wife or husband living with or dependent for support upon him or her at the time of his or her death; or living apart for justifiable cause or by reason of his or her desertion at such time.

17) The terms 'adoption' or 'adopted' mean legal adoption prior to the time of the injury.

18) The term 'student' means a person regularly pursuing a full-time course of study or training at an institution which is –

(A) A school or college or university operated or directly supported by the United States, or by any State or local government or political subdivision thereof.

(B) A school or college or university which has been accredited by a State or by a State recognized or nationally recognized accrediting agency or body.

(C) A school or college or university not so ac-

credited but whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited, or

"(D) An additional type of educational or training institution as defined by the Secretary.

but not after he reaches the age of twenty-three or has completed four years of education beyond the high school level, except that, where his tewnty-third birthday occurs during a semester or other enrollment period, he shall continue to be considered a student until the end of such semester or other enrollment period. A child shall not be deemed to have ceased to be a student during any interim between school years if the interim does not exceed five months and if he shows to the satisfaction of the Secretary that he has a bona fide intention of continuing to pursue a fulltime course of education or training during the semester or other enrollment period immediately following the interim or during periods of reasonable duration during which, in the judgment of the Secretary, he is prevented by factors beyond his control from pursuing his education. A child shall not be deemed to be a student under this chapter during a period of service in the Armed Forces of the United States.

19) The term 'national average weekly wage' means the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls.

20) The term 'Board' shall mean the Benefits Review Board.

21) The term 'vessel means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

22) The singular includes the plural and the masculine includes the feminine and neuter."

B) 33 U.S.C. 903:

"(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of –

1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injury to kill himself or another."

C) Opinions Attached:

1) BRB NO. 76-388, Decision filed January 20, 1978.

2) U.S. Fifth Circuit Court of Appeals, No. 78-1483, Decision of July 21, 1980
Reported at 622 F.2d 100 (5th Cir. 1980).

3) Opinion of Administrative Law Judge,
Dated April 13, 1976, No. 76-LHCA-213, OWCP No. 7-34536.

IN THE MATTER OF

GARFIELD MAZE, JR.
Claimant

v.

ODOM CONSTRUCTION CO., INC.
Employer

and

AMERICAN MUTUAL INSURANCE CO.
Carrier

Benefits Revies Board
Case No. 76-LHCA-213
OWCP No. 7-34536

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For the Director, OWCP

BEFORE: JOHN J. O'MALLEY, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding is on the claim of Garfield Maze, Jr., for compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* (hereinafter referred to as "the Act"). Pursuant to the provisions of Section 19(d) of the Act, 33 U.S.C. §919(d), and the Rules and Regulations set out in Parts 701 and 702 of Title 20, Code of Federal Regulations, a formal hearing was held in the matter on January 15, 1976 in New Orleans, Louisiana. The Claimant, Employer, and Carrier were afforded a full opportunity to be heard, to adduce relevant evidence, to call, examine, and cross-examine witnesses, to make oral argument and to submit post-hearing briefs. The Solicitor of Labor, the Employer and Carrier (hereinafter together referred to as "Respondents") and Claimant filed post-hearing briefs which, together with Claimant's Pre-Trial Memorandum, have been made part of the record in this proceeding and have been fully considered in reaching a decision herein.[1/]

Statement of the Case

The circumstances of Claimant's injury, as well as his work history, are not in dispute. Claimant, Garfield Maze, Jr., was accidentally injured on July 9, 1973 when an oxyacetylene torch that he was using to cut wire rope, exploded, burning his forearms. His burns were treated by a

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1/ Respondents filed a Supplemental Brief dated March 25, 1976, in response to the Solicitor's Brief. The Supplemental Brief has also been made part of the record and has been fully considered in reaching a decision herein.

local physician who discharged Claimant from his care on July 17, 1973, and cleared his return to work. Since the time of the accident Claimant has only worked about seven weeks, contending that he is unable to remain employed because of pain and weakness in his left wrist and hand caused by burns sustained in the accident.

At the time of his injury Claimant was employed by Odom Construction Company (hereinafter referred to as "Odom"), and was cutting wire rope with an acetylene torch. The rope was fastened to concrete blocks, weighing about 20 tons each, which were being used to moor barges along a canal. The blocks, which were being moved to higher ground, had sunk into the canal because of erosion caused by towboats. The barges were being used to haul salt from the Domtar Salt Company mine, which is adjacent to the Gulf of Mexico in Louisiana, to various points in the United States via the canal and the Intracoastal waterway system.

The Domtar salt mine itself is located on Miller's Island, which is bounded on one side by the Gulf of Mexico and on the other by the Intracoastal Canal. Domtar's canal, where Claimant was hurt, is about 500 feet long and connects Domtar's docks, where salt is loaded onto barges, with the Intracoastal Canal, which, in turn, connects with the Intracoastal Waterway System. Thus, a barge load of salt can be towed from Domtar's dock to any navigable river or waterway in the United States via the Intracoastal Waterway. The purpose of the mooring blocks alongside the Domtar canal was to secure barges waiting to be loaded at Domtar's dock. Barges could tie up to the blocks by attaching lines to the wire rope

which was wrapped around each block.

Claimant has been paid compensation under the Louisiana Workmen's Compensation Act at the rate of $65 per week since the date of the accident.

Issues

Odom contends that the accident does not fall within the jurisdiction of the Longshore Act because Claimant does not have the status of a maritime employee; and it is not an "employer" within the meaning of Section 2(4) of the Act. In addition, Odom contends that Claimant is not totally and permanently disabled, as he claims, but rather is at most suffering from an impairment of 25 percent to 50 percent of the left hand.

Opinion

It is the Presiding Officer's judgment that Claimant's accident, not only comes within the jurisdiction of the Act, but that he is permanently and totally disabled.

I. Jurisdiction

In order to come within the jurisdiction of the Act, the accident must have occurred upon the navigable waters of the United States as defined in Section 3(a) of Act; Odom must meet the definition of "employer" in Section 2(4) of the Act; and Claimant must meet the definition of "employee" in Section 2(3) of the Act.

The situs of Claimant's accident was on the bank of a canal which connects the Domtar salt mine with the Intracoastal Waterway. These are navigable waters of the United States by virtue of the fact

that the canal is used by commercial barges to access the Intracoastal Waterway. Odom contends, however, that since it is not engaged in the loading, unloading, repairing or building of vessels the fact that Claimant's accident may have occurred in an "adjoining area" was not enough to confer jurisdiction. Odom also contends that its role on the day of the accident was simply to raise the four concrete blocks which had slipped into the canal because of erosion, and to imbed them on higher ground so that they could continue to be used to moor barges awaiting their turn to be loaded at Domtar's docks; and this was not sufficient to bring it within the Act.

Odom's position is not sustained by the Act. Clearly, the general area where Claimant was injured was used by *an employer,* Domtar, to load its barges. The whole purpose of the concrete blocks on which Claimant was working at the time of the accident was to moor barges awaiting their turn to be loaded. The fact that neither Odom nor the fee simple owner of the canal bank might have been engaged in loading the barges is immaterial. The statute speaks in terms of *an* employer, not *the* employer, and Claimant's accident occurred in a protected situs under Section 3(a).

Odom is an employer within the meaning of Section 2(4) of the Act. Mr. Jessie C. Odom, the company's owner and manager testified that about 20 percent of Odom's business was maritime in nature, consisting primarily of marine pile driving and bulkheading, by crews specially designated for marine work. In support of that activity Odom also owned several boats. Since Section 2(4) provides, in part, that an "employer" is one, "*any of whose employees* are employed in maritime

employment, in whole, or in part, upon the navigable waters of the United States" (Emphasis supplied), and since about one-fifth of Odom's workers are so employed, Odom must be considered an "employer".

Claimant meets the definition of "employee" in Section 2(3), because the work in which he was engaged at the time of his injury – cutting wire rope attached to barge mooring blocks – was clearly maritime in nature, and the situs of his injury was upon navigable waters of the United States as defined in Section 3(a) of the Act. The defintion of "employee" in Section 2(3) is a broad one, since only two groups are specifically excluded: masters or members of crews of vessels *or* anyone engaged by the master to load, unload or repair a small vessel. There appears to be no sound reason why Claimant could not be considered a harbor worker; but even if the area where he was working when injured should not be considered a "harbor", it is well established that the Act is to be liberally construed in favor of the Claimant and that all factual doubts are to be resolved in his favor. *Voris v. Eikel,* 345 U.S. 328, 333 (1973); *J.V. Vozzolo, Inc. v. Britton,* 377 F.2d 144 (D.C. Cir. 1967).

The area where Claimant was working was at the edge of a navigable canal connecting the loading dock of the Domtar Salt Company with the Gulf Intracoastal Waterway, an avenue of maritime commerce. Claimant's duties at the time of the accident were to dig under four mooring blocks that had slipped by erosion into the canal, attach wire rope to them so that they could be lifted from the canal by a winch and reimbedded along the banks; and cut additional lengths of wire rope which could be wrapped around the blocks at their higher elevations, so that barges could be moored to them while awaiting a berth at the load-

ing dock. Clearly, Claimant was in a protected area within the meaning of Section 3(a), because, however the canal bank is described, whether it is a pier or wharf or "other adjoining area" it was used by Domtar for loading its vessels - the salt barges. Claimant, having met both the status and situs tests of the Act, will be found to be within the Act's coverage.

II. The Extent of Claimant's Disability

Claimant will be found to be totally and permanently disabled. The starting point in reaching a determination as to the nature and extent of disability is Section 20(a) of the Act, which creates a statutory presumption that a claim comes within the Act. That section has been recently interpreted by the United States Court of Appeals for the District of Columbia Circuit (in *Swinton v. J.Frank Kelly, Inc.*, Case No. 74-1164, decided February 3, 1976) and the Benefits Review Board (in *Norat v. Universal Terminal and Stevedoring Corp.*, BRB Nos. 75-162, 75-162-A, decided January 12, 1976); and the holdings of those decisions are that the statutory presumption of Section 20(a) applies to all elements of a claim, including the relationship between Maze's accident and his disability.

There is no dispute herein that Claimant's left hand and wrist were injured in the accident out of which this claim arose. He testified that he attempted to work after the accident but the pain and weakness in his left hand were such that surgical intervention was necessary, approximately five months after the accident, in December 1973. From then on he began taking physical therapy, but when there was no substantial improvement he was discharged from the active care of his physician, Dr. Cromwell, approximately one year after the surgery, in Decem-

ber 1974. At the hearing Mr. Maze testified that he still had no strength in his left hand. Claimant's testimony is substantiated by that of the physician who treated him, an *orthopedic surgeon*, Dr. Terry A. Cromwell, whose deposition is in evidence, and who found upon his last examination of Mr. Maze in December 1974 that he had a marked weakness in the grip of the left hand. That weakness was measured on a hand-gripping device called a dynamometer, and ranged from an "unbelievably weak" (Cromwell Deposition, p. 7) reading of five pounds on his first visit on October 30, 1973 to 30 pounds of pressure at his final visit in December 1974. The relative weakness was all the more significant because Mr. Maze was left-handed, and the grip strength of his right hand was 118 pounds (Deposition, p. 7). Based upon this weakness, Dr. Cromwell was of the opinion that Mr. Maze would be unable to carry out any type of heavy labor.

Rebutting Dr. Cromwell's testimony is that of Dr. Irving Redler, an orthopedic surgeon of thirty years' experience who examined Mr. Maze once, on July 2, 1975. Based upon that examination Dr. Redler found no medical impairment of the left hand. However, in reaching this conclusion Dr. Redler did not administer a dynamometer test, because it was "completely subjective" and "useless," because "you have to depend upon the cooperation of the patient and that takes it out of the realm of objective opinion" (Redler Deposition, p. 15). Dr. Cromwell, when asked during his deposition why he relied upon such a test, stated that the dynamometer readings were consistent; they did not widely vary; and the measurements made by a Rehabilitation Center in February 1974, upon

which he also relied, were consistent with his own findings (Cromwell Deposition, Attachment 2). Dr. Cromwell stated that he did not share the opinion of Dr. Stokes, who had examined Mr. Maze, on or about September 23, 1974, and concluded that he was not applying maximum pressure with his left hand. [2/] Dr. Cromwell's words were (Cromwell Deposition, pp. 21-22):

> "And the reason why I don't share that opinion is because I looked in his wrist. I operated on him, and I saw him a number of times, and I feel like he was telling me the truth. . . ."

Claimant testified that at the time of the hearing he was 54 years of age; that he had a fourth grade education; and no formal technical training. His work history included carpentry work, cement finishing, oil field construction and pipe line work, oyster shucking, truck driving, and heavy labor-type work. His duties for Odom included cement finishing, form-building, and heavy manual labor. All of the fore-

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2/ Respondents' objection to admission of the Rehabilitation Center's Report dated February 21, 1974 because it is hearsay, is overruled. It is in the same category as the testimony of Dr. Stokes, which was admitted, even though he did not testify (Tr. 130). The Rehabilitation Center Report has been considered only to the extent that Dr. Cromwell referred to it in his deposition as having information consistent with his own findings. Dr. Stoke's report indicates that he used a dynamometer test and that there was a wide variation in the measurement of strength in the right and left hand; but his conclusion that the patient was not applying maximum pressure with the left hand, as he was instructed to do, is not substantiated in his report, and, therefore, cannot be given any weight (Respondent's Exhibit 10, p. 2).

going jobs involve heavy use of hands, wrists, and arms.

In concluding that Claimant is permanently and totally disabled the Presiding Officer is relying upon the testimony of Dr. Cromwell rather than Dr. Redler. Not only was Dr. Cromwell better acquainted with Mr. Maze, having treated and observed him over a period of many months, but also his examination of the left wrist was more complete. 3/

Dr. Redler's opinion that dynamometer testing of hand strength was not valid was shared evidently by neither Dr. Stokes nor the Rehabilitation Center, both of whom used the test. Since Dr. Redler's opinion was not based on all the relevant facts, the dynamometer test having been omitted, Odom has not rebutted the presumption of Section 20(a) by substantial evidence and a finding regarding physical impairment must be made in favor of Claimant. *Norat, supra,* at 6.

It is well settled that the degree of disability cannot be measured by physical condition alone, but there must also be considered such other factors as age, education, industrial history, and availability of work which Claimant can do. *St. Clair Blakes v. Dixie Stevedores, Inc.*, BRB No. 75-193, decided December 2, 1975. The facts regarding Mr. Maze's age, education, and industrial history have already been recited. In addition the testimony of record is that Claimant lives in Franklin,

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3/ The fact that Dr. Redler may have examined Mr. Maze about seven months after Dr. Cromwell I find to be without significance. In his deposition Dr. Redler gave no substantial reason why his opinion ought to be given greater weight because of that fact. (See Redler Deposition, pp. 33-36).

Louisiana, a small community about 125 miles from New Orleans. Job opportunities are scarce there for persons with Mr. Maze's background. In any event, the burden was on Odom to show that suitable work opportunities are available for the injured employee. *Offshore Food Service v. Murillo,* 1 BRBS 9,11 (1974). The burden was not met by Respondents; so Claimant must be found to be totally and permanently disabled.

Therefore, based upon the entire record in this proceeding, including my observation of the witnesses and their demeanor, as well as my study of the applicable law, I make the following Findings of Fact, Conclusions of Law, and Order.

Findings of Fact

1. Claimant, Garfield Maze, Jr., at the time of the hearing was 54 years old, and has a fourth grade education.

2. Claimant's industrial history consists of employment as a carpenter, cement finisher, oil field construction worker, pipe line worker, truck driver, oyster shucker, and manual laborer.

3. Claimant, on July 9, 1973, while employed by Odom Construction Co., Inc., was accidentally burned when the hose parted on an acetylene torch which he was using to cut wire rope.

4. Claimant's accident occurred on a navigable canal connecting a loading dock of the Domtar Salt Co. with the Gulf Intracoastal Waterway.

5. Claimant at the time of his accident was cutting wire rope attached to barge mooring blocks which had slipped by erosion into the canal.

6. Claimant's average weekly wage at the time of the accident was $151.75, which yields a compensation rate of $101.17 per week.

7. Claimant has been paid compensation under the Louisiana Workmen's Compensation Act at the rate of $65 per week since the time of the accident.

8. Claimant sustained a burn on his left wrist for which he received treatment until December 1974.

9. Claimant returned to Odom on or about July 30, 1973, and worked until September 27, 1973, when he quit. The reason that he quit his job was because of continuing pain and weakness in his left hand.

10. Claimant also tried truck driving and cement finishing since the accident, but was unable to perform those tasks because of weakness in his left hand.

11. Claimant has been offered no other employment suitable to his age, educational and industrial history, or physical condition.

12. Claimant has reached the maximum level of medical recovery from the injury sustained in the accident.

13. At the time of the hearing Claimant was unemployed, and has been unemployed except for the period of time in which he worked for Odom following the accident.

Conclusions of Law

1. At the time of his accident, Claimant was an "employee" within the meaning of Section 2(3) of the Act, and was injured upon

the navigable waters of the United States, as defined in Section 3(a) of the Act. 33 U.S.C. §§902(3) and 903(a).

2. At the time of his injury Claimant was engaged in maritime employment, and the injury arose out of and in the course of such employment, within the meaning of Sections 2(a) and 2(3) of the Act. 33 U.S.C §§902(a) and 903(3).

3. Claimant is entitled to an award of compensation under Section 3(a) of the Act for permanent total disability under Section 8(a) of the Act. 33 U.S.C. §§903(a) and 908(a).

4. Claimant's permanent total disability commenced on July 9, 1973, and Claimant is entitled to compensation at the rate of $101.17 per week.

5. Any payments of compensation should be reduced by the amount of compensation that Claimant has received under the Louisiana Workmen's Compensation Act. *Western Boat Builders Co. v. O'Leary*, 198 F.2d 409, 411, 412 (9th Cir. 1952).

6. Any payments of compensation should be reduced by the amounts which Claimant earned following his accident while in the employ of Odom Construction Company.

7. An assessment of interest at the rate of six (6) percent per annum must be made against the Employer, computed from the date that each compensation payment was due and until it is paid. *Ryan v. McKie*, 1 BRBS 221, 229-230 (1974).

8. The Employer or Carrier is liable for an award of a reasonable fee of Claimant's attorney-at-law, under Section 28(d) of the Act. 33 U.S.C. §928(d).

9. The Employer or Carrier is also liable for costs for necessary witnesses, attending the hearing. This would include the costs of taking depositions of necessary witnesses. Since I am hereby finding Dr. Terry A. Cromwell to be a necessary witness, I am assessing against the Employer and Carrier the cost of taking his deposition, in the amount of $82 (Claimant's Exhibit 2). 33 U.S.C. §928(d).

10. Claimant is entitled to payment by the Employer or Carrier of, or reimbursement for, the reasonable cost of such medical treatment and care as the nature of his injury, may require in the future. Act, Section 7; 33 U.S.C. §907.

Order

1. The Employer or Carrier shall pay compensation to Claimant in a lump sum at the rate of $101.17 per week from July 9, 1973 to the date of this order; and, thereafter, in semi-monthly installments until otherwise ordered.

2. Compensation payments shall be subject to deductions for payments made to Claimant under the Louisiana Workmen's Compensation Act and for wages paid by the Employer to Claimant since the date of the accident.

3. The Employer or Carrier shall pay interest to Claimant on accrued benefits at the rate of six (6) percent per annum, computed from the date that each payment was made and until paid; and the total amount of such payments as are now due and owing shall be paid to Claimant in a lump sum.

4. Claimant's attorney will file an application for an attorney's fee within thirty (30) days of the date of this Order. Such application shall conform to Sections 702.132-702.135 of the U.S.

Department of Labor, and be accompanied by a certificate showing service upon Respondents' counsel, who will have ten (10) days in which to file a response. The ten day period will commence with the postmark date of the application and end with the postmark date of the response.

5. The Employer or Carrier shall pay directly to Elaine D. Gallaspy, Court Reporter, P.O. Box 51946, Lafayette, Louisiana 70501, the amount of $82 in a lump sum.

6. The Employer or Carrier shall pay Claimant for, or reimburse him for, the reasonable cost of all necessary medical treatment and care as the nature of his injury may in the future require.

/S/ JOHN J. O'MALLEY, JR.
JOHN J. O'MALLEY, JR.
Administrative Law Judge

Dated: April 13, 1976
Washington, D.C.

GARFIELD MAZE, JR.

Claimant-Respondent

v. Benefits Review Board

ODOM CONSTRUCTION CO., INC. BRB No. 76-388

and DECISION

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

Employer/Carrier-
Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

Appeal from the Decision and Order of John J. O'Malley, Jr., Administrative Law Judge, United States Department of Labor.

John A. Bivins (Mouton, Roy, Carmouche, Hailey, Bivins and McNamara), Lafayette, Louisiana, for the employer/carrier.

Mary A. Sheehan (Carin Ann Clauss, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chairman, and MILLER, Member.

MILLER, Member:

This is an appeal by the employer/carrier from a Decision and Order (76-LHCA-213) of Administrative Law Judge John J. O'Malley, Jr., pursuant to the provisions of the Longshoremen's and

Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter referred to as the Act).

Claimant, Garfield Maze, Jr., was injured on July 9, 1973 when an oxyacetylene torch he was operating blew up. The explosion and fire burned his hands and forearms. Claimant is left-handed. His left hand and arm were burned more extensively than his right. The burns were treated by a physician and he was discharged from treatment when they healed. Claimant experienced continued soreness and weakness in his left hand, arm and wrist. In November of 1973 he was referred to a specialist by the employer's insurance carrier. His condition was diagnosed as tenosynovitis and carpal tunnel compression. Claimant underwent surgery in December 1973 in order to relieve the pain and weakness he was experiencing in his left hand and arm. After surgery and a course of physical therapy there was, according to claimant's testimony, no substantial reduction of pain or increase in strength in his left hand.

At the time of his injury, claimant was employed by Odom Construction Company. Odom had a contract with Domtar Salt Company to move four concrete blocks out of a man-made canal and onto higher ground on the bank. The blocks had slipped into the water because of the erosion of the canal bank. A dock runs down the center of this canal. Barges are loaded with salt at the dock and then hauled to the intra-coastal waterway and various destinations within the United States. These barges tie up to one of the concrete blocks along the bank, so they will not drift, while they wait for room at the loading dock. Claimant was preparing to cut some wire cable to wrap around the block as a hoist when he was injured.

At the formal hearing Odom contested jurisdiction and degree of disability. The administrative law judge found that the claim came within the jurisdiction of the Act and that claimant was permanently totally disabled. An award of compensation was made. Odom has appealed to this Board arguing that the administrative law judge erred in finding the claim within the jurisdiction of the Act, and finding that claimant's disability is total.

Odom denies that claimant is an "employee". The Act defines an "employee" as

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker. . . .

33 U.S.C. §902(3). The definition in Section 2(3) covers any person in "maritime employment". It specifically mentions longshoremen and harbor workers but "maritime employment" is an even broader category.

In *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976) the U.S. Court of Appeals for the Fifth Circuit held that certain workers injured while handling cargo on shore or while fabricating parts on shore to be installed on a newly launched ship are maritime employees. The court concluded that these workers were "directly involved" with longshoring and shipbuilding work. The court went on to state that,

> [b]y this holding, we do not mean to suggest that future cases may not bring to light other types of covered work which cannot be characterized as loading, unloading, repairing, building, or breaking, and which are not "directly involved" with these five types

> of work, but which nevertheless are sufficiently similar to fall within the Congressional scheme. No such additional category of covered work appears in the cases before us but we will not foreclose the possibility of such categories arising in future litigation.

Perdue, supra at 540 n. 18.

It has been held that a worker who was sandblasting a disassembled crane used in shipbuilding is engaged in maritime employment, since repair and maintenance was an essential aspect of the business. *Alabama Dry Dock and Shipbuilding Co. v. Kininess,* 554 F.2d 176 (5th Cir. 1977). Likewise, those who maintain and repair equipment used in loading and unloading cargo from ships are maritime employees. *Texports Stevedore Co. v. Winchester,* 554 F.2d 245 (5th Cir. 1977); *Bradshaw v. J.A. McCarthy, Inc.,* 3 BRBS 195, BRB No. 75-209 (Jan. 26, 1976), *Aff'd,* No. 76-1146 (3rd Cir. Sept. 19, 1977); *Herron v. Brady-Hamilton Stevedore Co.,* 1 BRBS 273, BRB No. 74-171 (Jan. 23, 1975).

An engineer who died while being trained as a scuba diver to inspect the underwater facilities of his employer was held to be a maritime employee. *Sharp v. Pacific Gas and Electric Co.,* 2 BRBS 381, BRB No. 75-170 (Oct. 30, 1975). In that case this Board stated that

> [a]lthough "maritime employment" *includes* ". . . any longshoreman or other person engaged in longshoring operations, and and harbor-worker including a ship repairman, shipbuilder, and ship breaker. . .", it is not *limited* to persons engaged in those activities. 33 U.S.C. §902(3).

Sharp, supra at 384.

Therefore, we conclude claimant is covered by Section 2(3) of the Act in that the work he performed was maritime employment. He was repairing and maintaining a temporary docking area in a ship loading facility. This waiting area requires periodic maintenance, as did the ship loading equipment in *Texports Stevedore Co. v. Winchester, supra.* The temporary docking arrangement was essential and functionally related to the safe, orderly barge loading process at Domtar's Salt Mine.

Employer also argues that the injury which claimant suffered did not occur at an appropriate situs as specified in Section 3(a) of the Act. 33 U.S.C. §903(a). That section states that

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

It has been held that an area within a shipbuilding facility where men repair, assemble and maintain equipment used in shipbuilding is a situs as described in Section 3(a). This is so even though the maintenance area is several blocks away from the water's edge. *Texports Stevedore Co. v. Winchester, supra* at 247; *Alabama Dry Dock and Shipbuilding Co. v. Kininess, supra* at 178. Clearly an area at the water's edge which is customarily used as a wharf and is within the employer's ship loading facility is such a situs. Although no actual loading or unloading

goes on at this exact location it is a necessary temporary landing place for barges and is essential to the shiploading operation at the pier a short distance across the canal.

Odom also argues that a proper reading of the parenthetical language in Section 3(a) requires that the claimant's own employer must use the area to load, unload, repair or build a vessel in order for it to be a covered situs. The Board has interpreted this language in accordance with its plain meaning and has not required a specific employer to load or unload vessels at the situs. *Harris v. Maritime Terminals, Inc.*, 1 BRBS 301, 305, BRB No. 74-178 (Feb. 3, 1975).

Odom repeats this argument in reference to identical language in Section 2(4) of the Act. 33 U.S.C. §902(4). Odom contends that it is not an employer since it is not involved in loading, unloading, repairing or building a vessel. Section 2(4) only requires that the claimant's own employer have employees engaged in maritime employment to be a covered employer. The Fifth Circuit in *Jacksonville Shipyards v. Perdue* held that "if a claimant can satisfy Sections 902(3) and 903(a), his employer is automatically brought within Section 902(4)." *See also Kelly v. Handcor, Inc.*, 1 BRBS 319, 323-24, BRB Nos. 74-165, 165A (Feb. 28, 1975); *Harris v. Maritime Terminals, Inc.*, 1 BRBS 301, 304, BRB No. 74-178 (Feb. 3, 1975); *Thompson v. Oceanic Container Service*, 5 BRBS 831, 835, BRB No. 76-294, (May 12, 1977). Odom, therefore, fulfills the definition of an employer under Section 2(4) of the Act.

Since the injury occurred to a maritime employee, employed by a covered employer, at an appropriate situs, claimant is within the jurisdiction of the Act.

Finally, Odom contends that the administrative law judge erred when he found that claimant was permanently and totally disabled. The Board must affirm the Decision of the administrative law judge when it is supported by substantial evidence, is not irrational and is in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith Associates*, 380 U.S. 359 (1965).

Disability is an economic concept based on a medical foundation. *Owens v. Traynor*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968). Disability therefore cannot be measured by physical condition alone. Consideration must be given to claimant's age, education, industrial history, and the availability of employment he can perform after the injury. *American Mutual Ins. Co. v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). The administrative law judge relied heavily on the claimant's testimony and that of claimant's doctor in arriving at the conclusion that claimant is permanently totally disabled. Uncontested evidence in the record indicates that claimant was 54 years old at the date of the hearing, that he has a fourth grade education, and that his work history is entirely made up of jobs which involve heavy use of hands, wrists, and arms. Claimant testified that he has attempted to work as a truck driver and as a cement finisher since the time of the accident but that he is unable to do either of these jobs because of weakness and pain.

Mr. Odom testified that there were jobs for unskilled laborers in the area where claimant lived but on cross-examination he indicated that these jobs all require use of both hands. He testified that he had no familiarity with the job market for someone unable to do heavy labor or construction work.

> The burden is on the employer to establish that an employee injured in the course of his employment who proves he is disabled from his regular employment has had actual opportunities to obtain other work.

Perini Corp. v. Heyde, 306 F.Supp. 1321, 1325-26 (D.R.I. 1969). *See also American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976). Odom does not argue that claimant is able to perform his regular duties as a heavy construction laborer. Odom has not met the burden of establishing that claimant has actual opportunities to obtain other work in the geographic area where he lives. Therefore, considering the record and the applicable law, claimant must be considered to be permanently totally disabled.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

/S/ JULIUS MILLER
JULIUS MILLER, Member

I Concur: /S/ SAMUEL J. SMITH
SAMUEL J. SMITH, Chairman

Dated this 20th day
of January, 1978

SERVICE SHEET

BRB No. 76-388: GARFIELD MAZE, JR. v. ODOM CONSTRUCTION CO., INC. AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY (Case No. 76-LHCA-213) (OWCP No. 7-345-36)

A copy of this Decision was sent to the following parties:

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ODOM CONSTRUCTION COMPANY, INC.,
Employer, and American Mutual Insurance
Company, Carrier, Petitioners,

v.

UNITED STATES DEPARTMENT OF LABOR
and Director, Office of Workers' Compensation
Programs, United States Department of Labor
and Garfield Maze, Jr., Respondents

No. 78-1483

United States Court of Appeals,
Fifth Circuit.

July 21, 1980

Employer sought review of decision of Benefits Review Board affirming award of total and permanent disability benefits under the Longshoremen's and Harbor Workers' Compensation Act. The Court of Appeals, Godbold, Circuit Judge, held that: (1) worker who was engaged in attempting to move mooring blocks at the time of the injury was engaged in maritime work; (2) worker was employed on a covered situs; and (3) evidence sustained determination of total and permanent disability.

Affirmed.

1. Workers' Compensation -- 262

Worker who was injured while removing concrete mooring blocks from canal into which they had fallen was engaged in maritime work for purposes of determining whether he was covered by the Longshoremen's and Harbor Workers' Compensation Act. Longshoremen's and Harbor Workers' Compensation Act, § 2(3), 33 U.S.C.A. §902(3).

2. Workers' Compensation - - 262

Fact that injured worker spent a great majority of his time doing indisputably land-based jobs did not preclude coverage under Longshoremen's and Harbor Workers' Compensation Act where he was doing maritime work at the time of the injury and a significant part, 20%, of the employer's overall work was maritime. Longshoremen's and Harbor Workers' Compensation Act, § 2(3), 3 U.S.C.A. §902(3).

3. Workers' Compensation - - 262

Fact that it was some other employer, rather than claimant's employer, which used the mooring blocks on which the claimant was working at the time of his injury did not preclude a finding that the claimant was injured on a covered situs; it is sufficient if an employer, not necessarily the claimant's employer, is engaged in maritime work. Longshoremen's and Harbor Workers' Compensation Act, § 3(a), 33 U.S.C.A. §903(a).

4. Workers' Compensation - - 187

Company which used mooring blocks as an integral part of its facilities for loading sale onto barges was a statutory employer under the Longshoremen's and Harbor Workers' Compensation Act. Longshoremen's and Harbor Workers' Compensation Act, §§2(4), 3(a), 33 U.S.C.A. §§ 902(4), 903(a).

5. Workers' Compensation - - 186

Phrase "customarily used by an employer" as used in original Longshoremen's and Harbor Workers' Compensation Act to describe a covered situs was meant to insure that an employer who is liable only when it has real or constructive notice that the area is used for mari-

time purposes and is thus likely to be a covered situs; the claimant's actual employer need not be the customary user. Longshoremen's and Harbor Workers' Compensation Act, § 3(a), 33 U.S.C.A. §903(a).

6. Workers' Compensation - - 1935, 1939.4(4)

Decision of the benefits review board on the issue of total and permanent disability must be upheld if it correctly finds that the ALJ'S decision is supported by substantial evidence on the record as a whole; all doubts are to be construed in favor of the employee in accordance with the remedial purposes of the Longshoremen's and Harbor Workers' Compensation Act.

7. Workers' Compensation - - 1662

Evidence that injured worker was 54 years old and had a fourth grade education with no formal technical training, that all of his work history involved jobs requiring heavy use of the arms, that his left, dominant, hand and arm was injured when an oxyacetylene torch exploded, that he lived in a small town 125 miles from New Orleans, that he had attempted to return to work as cement finisher and driver of heavy trucks but could not perform those duties, that he had an accident-related weak grip, and absence of evidence of available work which he could perform sustained determination of total and permanent disability.

Petition for Review of an Order of the Benefits Review Board

Before GODBOLD, GARZA and RANDALL, Circuit Judges.

GODBOLD, Circuit Judge:

This is a petition by the employer and its insurer for review of a decision by the Benefits Review Board affirming an Administrative Law Judge's award to the respondent Maze of permanent disability benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* ("LHWCA"). The petitioners raise three arguments: (1) Maze was not a covered "employee" within the meaning of 33 U.S.C. § 902(3);[1] (2) he was not injured on a situs covered under 33 U.S.C. § 903(a);[2] and (3) he was not permanently disabled as defined in 33 U.S.C. § 902(10).[3]

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1. 33 U.S.C. § 902(3) provides that:

[t]the term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

2. 33 U.S.C. § 903(a) provides in relevant part that:

[c]ompensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

3. 33 U.S.C. § 902(10) provides that:

'[d]isability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

I. Coverage under LHWCA

The facts underlying Odom's arguments that Maze was not a covered employee injured on a covered situs are largely undisputed. Maze, an employee of Odom, was accidentally injured on July 9, 1973 when an oxyacetylene torch, which he was using to cut wire rope, exploded and burned his forearms. Maze was normally a land-based construction worker. On the day of his injury he was engaged in a two-day job that required moving four large concrete blocks that had been located on the bank of a navigable canal [4] but had sunk into the water because of erosion. Earlier in the day of his injury Maze had been in the water digging under the blocks so that wire rope could be passed around them, but he was standing on shore when the torch exploded. The blocks were used solely as a place to tie off or moor barges that were waiting to be moved to the loading facilities of Domtar Salt Mine Company and barges that, after being loaded, were awaiting towboats.

1. Maze's status under 33 U.S.C. § 902(3)

Odom argues that Maze is not a covered "employee" both because moving the concrete blocks was not maritime work and because the great majority of Maze's work for Odom was indisputably nonmaritime. We reject both arguments.

[1] First, the act of moving the blocks is maritime work. Section 902(3) lists harborworkers among the types of workers covered. It is at least arguable that the repair of moorings, even of those not adjacent

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4. The canal was connected to the Intracoastal waterway system so that barges could be moved to various points in the United States.

to main docks, is a type of job that could be performed by a typical harborworker. Yet we need not hold that Maze was engaged in "harborworking" at the time of his injury, for § 902(3) by its own terms states that longshoremen and harborworkers are not the only persons engaged in maritime employment. *Cf. P.C. Pfeiffer Co. v. Ford*,——U.S. ——, ——, 100 S.Ct. 328, 334, 62 L.Ed.2d 225, 233 n.7 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 265 n.25, 97 S.Ct. 2348, 2358, 53 L.Ed.2d 320, 334 n.25 (1977) (maritime employment includes more than longshoring). Moving the blocks directly furthered maritime commerce. By tying up to the blocks, barges were moored and held in place before loading until they could be moved to the loading facilities and, after loading, until they could be taken away by tugs. Relocating the blocks after they had fallen or slipped into the water from erosion is not the type of job peripherally related to maritime matters that Congress said was not to be covered by the LHWCA, such as trans-shipment of stored cargo or clerical work. See S.Rep. No. 92-1125, 92d Cong., 2d Sess. 13; H.R.Rep. No. 92-1441, 92d Cong. 2d Sess. 10-11, *quoted in P.C. Pfeiffer Co., supra*, ——U.S. at ——, 100 S.Ct. at 335, 62 L.Ed.2d at 234; *Caputo, supra*, 432 U.S. at 265 n.27, 97 S.Ct. at 2358, 53 L.Ed.2d at 334 n.27. On the facts before us, where the job being done clearly had "a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters' . . .," *Weyerhauser Co. v. Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975), *cert. denied*, 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976) (citations omitted), Maze's work at the time of his injury was maritime.

[2] The appellants urge that even if Maze was doing maritime work at the time of his injury, he is not a covered employee because he spent the great majority of his time doing indisputably land-based jobs. They assert that the 1972 amendments extended coverage only to workers who do primarily maritime employment. Arguably, our decision that Maze is a covered employee could be based solely upon the foregoing conclusion that he was engaged in maritime work at the time of his injury. See *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 843-45 (5th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S.Ct. 2820, 61 L.Ed.2d 274 (1979); 1A Benedict on Admiralty § 16a (1979); *cf. Fusco v. Perini North River Assoc.*, 601 F.2d 659, 668 (2d Cir. 1979), *vacated and remanded*, —— U.S. ——, 100 S.Ct. 697, 62 L.Ed.2d 664 (1980) (claimant must have major activities on navigable waters). We need not rest on this narrow ground, however, but can look at all the circumstances of Maze's employment. Where, as here, the claimant was doing maritime work that required him to go into the water and where a significant part of the employer's overall work, 20%, was maritime, the policy of the Act strongly favors coverage.

A finding that Maze was not covered would create a major opportunity for abuse of the Act, a risk that is illustrated by the facts of this case. Mr. Odom testified in the hearing before the ALJ that, at the time of Maze's injury, approximately 20% of his company's work involved bulkheading and piledriving in navigable waters. He stated further that he had a separate crew for that type of work and in fact had separately incorporated those operations just before the hearing. If any member of this "maritime" group had been the claimant here, there

would be no doubt about his status as a covered employee. Odom should not benefit from the fact that it has not elected to assign Maze, who was injured while engaged in clearly maritime activity, to some group or crew identified as carrying on maritime activity.

At least twice, in construing the maritime employment requirement of the Act, the Supreme Court has pointed out that coverage should not turn on the employers' assignment policies. In *P.C. Pfeiffer Co., supra,* the employer suggested that the Act reached only employees who, on the days of their injuries, could have been assigned to work on navigable waters. The Court stated that under such an interpretation an employer could impermissibly limit his liability under the Act simply by prohibiting some of his cargo-moving employees, who would otherwise have been covered, from working on navigable waters. —— U.S. at ——, 100 S.Ct. at 337, 62 L.Ed.2d at 237. In *Caputo,* the employer urged that the Act covered only workers who handled cargo before it reached its first "point of rest" on land. The Court noted that such a construction would permit an employer to define the limits of his liability at his whim by moving the point of rest. 432 U.S. at 275 n.38, 97 S.Ct. at 2363, 53 L.Ed.2d at 340 n.38. In both cases the Court found that permitting coverage to turn on assignment policies was inconsistent with the professed Congressional desire for uniform coverage.

Denying recovery to Maze here would allow employers like Odom, who do substantial amounts of both maritime and nonmaritime work, to avoid liability under the Act to workers injured while engaged in maritime activity simply by allowing each employee to do only a limited amount of maritime work. Under the Supreme Court's analysis

in *Caputo and Pfeiffer*, such a result would be contrary to Congressional intent.

2. The situs under 33 U.S.C. § 903(a)

Appellants contend that Maze was not injured on a covered situs. They assert that the mooring blocks are not a "pier" or "wharf" and that their site, therefore, comes within the jurisdiction of the Act only if it is an "other adjoining area customarily used by an employer in loading, unloading, repair, or building a vessel." They interpret the phrase "customarily used by an employer . . . " to extend coverage only when the *claimant's* employer normally uses the facility for loading or unloading. They state that permitting coverage if the area is used for the listed purposes by any employer other than the claimant's would be inconsistent with the definition of employer given in 33 U.S.C. § 902(4).[5]

[3,4] Odom's suggestion that coverage would be available only if it, the employer, used the mooring blocks is both an inappropriately strained reading of the statute and contrary to the overall Congressional intent. The stated limitation is cast in terms of *an* employer,

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5. 33 U.S.C. § 902(4) defines employer to mean:

> an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used in loading, unloading, repairing, or building a vessel).

On appeal, Odom does not contend seriously that it is not a statutory employer. That argument, however, was raised and rejected by both the ALJ and Benefits Review Board.

not *the* employer or the *claimant's* employer. A more reasoned interpretation is that the site must be used by a statutory employer. It is clear from the record and the findings below that Domtar Salt, which uses the blocks as an integral part of its facilities for loading salt onto barges, is a statutory employer.

[5] In addition, it seems clear to us that the phrase "customarily used by an employer. . . " was inserted to ensure that an employer could be liable only when it had real or constructive notice that an area was used for maritime purposes and was therefore likely to be a covered situs. This notice function would not be aided substantially by requiring the claimant's employer to be the customary user, as illustrated by the fact that Odom makes no claim here that it did not know about Domtar's use of this site.[6]

Moreover, the appellants' interpretation would open up a significant loophole in the LHWCA since there would be no coverage if the customary user of an area simply hired various independent contractors on a short-term basis to perform the necessary work. (The individual independent contractors presumably would not qualify as customary

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6. Our analysis of the notice function would be essentially the same regardless of whether the customary use requirement applies only to "other areas," see *Caputo*, 432 U.S. at 278-280, 97 S.Ct. at 2365, 53 L.Ed.2d at 342-43 (reserving question but noting that such an interpretation is probably correct) or to all areas on shore. See *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 541-43 (5th Cir. 1976), *vacated in part and remanded*, 433 U.S. 904, 97 S.Ct. 2967, 53 L.Ed.2d 1088 (1977), adhered to on remand, 575 F.2d 79 (5th Cir. 1978), aff'd on other grounds *sub nom. P.C. Pfeiffer Co. v. Ford, supra*. As a result, we do not need to define the exact parameters of that requirement.

users.) This gap in coverage would be especially large if the limiting language applies to all shore-side sites. Such a result would be inconsistent with the professed Congressional intention for exclusive uniform coverage. Thus we accept the findings below that Maze was injured in a situs covered under 33 U.S.C. § 903(a).

II. Disability

[6] On the existence of total and permanent disability, we must uphold the Board's decision if it correctly concluded that the ALJ's decision is "supported by substantial evidence on the record as a whole and is in accordance with the law." *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003, 1005 (5th Cir. 1978) (citations omitted); see *Jacksonville Shipyards, Inc. v. Dugger*, 587 F.2d 197, 198 (5th Cir. 1979); *Army & Air Force Exchange Service v. Greenwood*, 585 F.2d 791, 793 (5th Cir. 1978). All doubts are to be construed in favor of the employee in accordance with the remedial purposes of the Act. *Id.* at 794.

As noted above, the Act defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Although the Act does not provide a standard by which to determine degree of disability, we have held that this determination must be based not only on physical condition but also on other indicia such as age, education, employment history, rehabilitative potential, and the availability of work that the claimant can do. *See Dugger, supra*, 587 F. 2d at 198; *Greenwood, supra*, 585 F.2d at 796; *Diamond M. Drilling Co., supra*, 577 F.2d at 1005-06. Thus, "an individual may be totally disabled for purposes of the Act when physically capable of performing certain

work but otherwise unable to secure that particular kind of work." *Id.* at 1006.

[7] It is undisputed that Maze was 54 years old at the time of his hearing four years ago and that he has a fourth grade education with no formal technical training. His work history involved various jobs, all of which required heavy use of the arms, wrists, and hands. After his accident Maze attemted to work as a cement finisher and a driver of heavy trucks. He stated that he was unable to do these jobs because of the injuries to his left hand even though he had done similar work in the past. Finally, Maze lives in a small town about 125 miles from New Orleans.

The primary issue regarding disability is whether there is substantial evidence that Maze is permanently injured. Maze's basic complaint is that his left or dominant hand has a very weak grip. Dr. Cromwell, who had treated Maze for a year, including the performance of surgery on his left wrist, testified that Maze's accident had caused him to have a very weak grip even though there was little objective evidence to show the existence of his injury. Appellants' experts testified that Maze showed no sign of permanent injury, and one expressed the opinion that the dynamometer test used by Dr. Cromwell and the other expert was invalid. In concluding that Maze did have an accident-related weak grip, the ALJ relied upon Dr. Cromwell's testimony because he had treated Maze over an extended period while appellants' experts had seen Maze only one time each. He also rejected the testimony that the dynamometer test was invalid. The ALJ's conclusions are supported by substantial evidence and must stand.

Appellants also urge that Maze is not totally disabled. Dr. Cromwell testified that Maze was unable to do heavy labor and could lift no more than 30 pounds. The ALJ found that after the accident Maze was unable to do two of the jobs that he had previously performed. Appellants point out, however, that Dr. Cromwell said that Maze could do light work, such as driving a light truck and lifting packages of up to 30 pounds and that Maze apparently had not tried to find such light work. The Board stated that because Odom did not contend that Maze could still do heavy construction work on a regular basis, Odom had the burden to show the availability of work that Maze could do, and since Odom had made no such showing concluded that Maze was totally disabled.

Although the Act does not define a claimant's burden for establishing the existence of a disability, most courts have held that a claimant has made out a prima facie case once he has shown that he can no longer perform his previous job because of a job-related injury. At that point the burden shifts to the employer to show the availability of other jobs that the claimant could perform. See *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 62 n.7 (3d Cir. 1979); *Newport News Shipbuilding & Dry Dock Co. v. Director, Office of Workers' Compensation Programs*, 592 F.2d 762, 764-65 (4th Cir. 1979); *Perini Corp. v. Heyde*, 306 F.Supp. 1321, 1325-29 (D.R.I. 1969); see also *American Stevedores, Inc. v. Salzano*, 538 F.2d 933, 935-36 (2d Cir. 1976). But see *Air America, Inc. v. Director, Office of Workers' Compensation Programs*, 597 F.2d 773, 778-781 (1st Cir. 1979) (burden shifts only when "claimant's inability to work seems probable, in light of claimant's physical condition and other circumstances - such as claimant's age, education, and work experience"). This two-step analysis is consistent with our decision in *Base Billeting*

Fund, Laughlin Air Force Base v. Hernandez, 588 F.2d 173, 178 (5th Cir. 1979). See also *Greenwood, supra*.[7]

Our decision in *Diamond M. Drilling Co.*, is not to the contrary. In that case the claimant had shown that he was unable to do any work whatsoever after his job-related injury. The court stated that under those circumstances the employer had the burden of showing available work. Notably, however, the court did not say that the burden shifted only after the claimant's showing of complete inability to work. We think, rather, that the claimant in *Diamond M.* simply carried more than the initial burden of proof required of him in this circuit.

Under the ALJ's findings of fact, which are supported by substantial evidence, Maze made out a prima facie case by showing inability to do his previous job because of a job-related injury. Odom has presented no evidence of available work that Maze could still perform. Thus the ALJ's conclusion, as affirmed by the Benefits Review Board, that Maze is totally and permanently disabled must stand.

The order of the Board must be affirmed.

AFFIRMED.

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7. By analogy, in suits brought for disability benefits under the Federal Old-Age, Survivors, and Disability Insurance Benefits Act, 42 U.S.C. §§ 401-31, this court has consistently held that the burden to show employment available to a claimant shifted to the Secretary of Health, Education, and Welfare once the claimant showed that he was no longer able to do his previous job. See *Knott v. Califano*, 559 F.2d 279, 281 (5th Cir. 1977); *DePaepe v. Richardson*, 464 F.2d 92, 100-01 (5th Cir. 1972); 42 U.S.C. § 423.